United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1059

SUSAN L. ROSENSTIEL,

Plaintiff-Appellant,

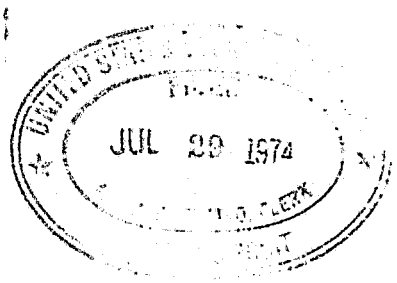
-against-

LEWIS S. ROSENSTIEL,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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Docket No. - 74-1059

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN ROSENSTIEL,

Plaintiff-Appellant,

-against-

LEWIS ROSENSTIEL,

Defendant-Appellee.

APPELLANT'S BRIEF

Statement of Issues Presented For Review

1. Did the evidence support plaintiff's contention that defendant had not established the required " bona fides" domicile in Florida?

2. Was plaintiff entitled to a most favorable construction of the meaning of language contained in the Ante-Marital Agreement construing "divorce by a Court of Competent Jurisdiction" to mean "divorce by a Court of competent jurisdiction to pass on the marital status and property rights of the parties."

3. Was Plaintiff entitled to a Judgment impressing a constructive Trust to Provide In Defendant's Estate Assets Sufficient to Satisfy Plaintiff's Rights under the Ante-Nuptial Agreement.

4. Was the Denial of Counsel Fees to Plaintiff an abuse of Discretion by the Trial Court.

Statement of Case and Facts

1. The parties, Susan Rosenstiel ("Susan") and Lewis Rosenstiel ("Lewis") were married on November 30, 1956 in the City of New York and lived together as man and wife until on or about October 18, 1961 (Pre-Trial Order, par. 3(b)).

2. Susan's prior marriage to one Felix Kaufman had been dissolved by a valid decree of divorce rendered on October 2, 1954 by the First Civil Court of the District of Bravos, City of Juarez, State

of Chichuahua, Republic of Mexico (Pre-Trial Order, par. 3(d)).

3. On the day preceding Lewis' marriage to Susan, they executed an ante-nuptial agreement, which was thereafter amended in writing (Pre-Trial Order, par. 3(c); Exs. A, B and C respectively to Amended Complaint herein and Joint Exs. IV-1, IV-2 and IV-3).

4. The said Ante-Nuptial Agreement, as amended provided, among other things, that plaintiff's rights as therein defined was subject to defeasance upon failure of a "condition that (Susan) survive (Lewis) and upon (failure of a) further condition that at the time of (Lewis) death, the parties have not been divorced, or separated by a decree of a Court of competent jurisdiction, or separated by written agreement." (Par. 1(l) of Joint Ex. IV-3).

5. On November 9, 1961, Lewis commenced an action against Susan in Connecticut, for (i) Annulment of the marriage of the parties on the ground that defendant was fraudulently induced to marry plaintiff, or (ii) for a divorce on the ground of plaintiff's cruel and inhuman treatment. On January 3, 1962, Lewis amended his complaint in that action to include an additional ground for annulment that Susan's prior Mexican divorce from Felix Ernest Kaufman was void (Pre-Trial Order, para. 3(e)).

6. Plaintiff appeared specially in that Connecticut action contesting the jurisdiction of theCourt (Pre-Trial Order, para. 3(b)).

7. On April 26, 1962, Lewis discontued his action for annulment or divorce commenced in the Superior Court of the State

of Connecticut and commenced an action against Susan for an annulment in the Supreme Court of the State of New York, County of New York. (Pre-Trial Order, Par. 3 (b).).

8. Although Lewis initially was granted the annulment, the Court reserving decision as to the right to the support of Susan, the Appellate Division reversed, and its decision was affirmed by the Court of Appeals. (Rosenstiel v. Rosenstiel, 43 Misc. 2d 462, 251 N.Y.S. 2d 565 (1964), reversed 21 A. D. 2d 635, 253 N. Y. S. 2d 206 (1964), affirmed 16 N. Y. 2d 64, 262, N.Y. S. 2d 86 (1965), cert. denied 384 U. S. 971 (1966). (Joint Ex. VI-2, VI-3).

9. At the conclusion of Lewis unsuccessful annulment action, proceedings were then had in the Supreme Court, New York County, with respect to Susan's support and counsel fees, and a hearing was held before Mr. Justice

Nathaniel T. Helman. In this proceeding the Court (by Helman, J.) found that Lewis charge of abandonment and cruelty had not been proved; that "the alleged misconduct of (Susan) would not constitute grounds for separation so as to deny support within the meaning of Section 236 (of the Domestic Relations Law)" (Rosenstiel v. Rosenstiel, N. Y. L. J. Dec. 1, 1966, p. 17, Col. 7) Joint Ex. V-I (Decision and Judgment).

10. The award was modified (increased) and approved on appeal to the Appellate Division, First Department on June 6, 1967, Joint Ex. V-2, 28 A. D. 2d 651. This Order of the Appellate Division was approved, by the New York Court of Appeals on November 29, 1967 (Joint Ex. V-3), 20 N. Y. 2d 925.

11. On March 24, 1967, while the appeal from the decree in the New York support proceeding was pending, Lewis instituted an action against plaintiff in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, for a divorce. Joint Exs. I-I and I-2.

12. Susan was served with process in the defendant's Florida action for divorce by publication. Joint Ex. I-3. Amended complaint, par. 15, and did not appear therein. (Amended complaint par. 28, 29, 30).

13. On May 12, 1967, Susan commenced this present action and obtained a temporary restraining order restraining Lewis from prosecuting the Florida divorce proceeding. (Order of Judge Wyatt herein, dated Mar. 12, 1967) (Plaintiff's Ex. N). However, five hours earlier the Florida Court had granted Lewis an in rem decree of divorce. Thereafter

Susan's application for a preliminary injunction and to hold Lewis in contempt were denied by Judge Tenney (Joint Ex. I-5; Opinion of Judge Tenney herein dated Dec. 14, 1967, 278 F. 3, at 796, 799).

POINT I

THE DEFENDANT HAD NOT EFFECTED THE REQUIRED "BONA FIDE" DOMICILE IN FLORIDA. THE FLORIDA DECREE IS NULL AND VOID FOR LACK OF JURISDICTION AND IS SUBJECT TO COLLATERAL ATTACK.

The interests of a state so intimately attach to the marital status of its domiciliaries that the states are empowered in the appropriate circumstance to grant ex parte divorces. Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347 (1913). It is the general rule that such judgments of sister states are entitled full faith and credit under

Article IV, Section of the Constitution. Williams v. North Carolina (I), 317 U.S. 287, 63 S.Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273 (1942).

The Judicial power to grant a divorce is founded on domicile. Bell v. Bell, 181 U.S. 175, 21 S. Ct. 551, 45 L. Ed. 804 (1901); Andrews v. Andrews, 188 U. S. 14, 23 St. Ct. 237, 47 L. Ed. 366 (1903). Where domicile is lacking, the Court is without power to grant a divorce. Alton v. Alton, 207 F. 2d 667 (3 Cir., 1953) cert. granted and then dismissed as moot, 347 U. S. 610, 74 S. Ct. 736 (1954). Accordingly, neither Florida nor New York give full faith and credit to divorce obtained in sister states which lack requisite domicile. Beckwith v. Bailey, 119 Fla. 316, 161 So. 576 (1935); McCarthy v. McCarthy, 179 Misc. 623, 39 N.Y.S. 2d 922 (1943) aff'd. 268, App. Div. 1070, 52 N.Y.S. 2d 817.

Where both parties appear in and fully litigate a "bilateral" divorce, the Court may determine for itself its jurisdiction over the parties and the action, and that determination itself is entitled full faith and credit. Sherrer v. Sherrer, 334 U. S. 343, 68 S. Ct. 1087, 92 L. ed. 1429 (1948). But where one party fails to appear and contest an "ex parte" divorce, the ultimate decree is entitled to full faith and credit only where the party who sought the relief was a domiciliary and could invoke the jurisdiction of the Court.

This proposition is explained lucidly in Williams v. North Carolina (II), 325 U. S. 226, 65 S. Ct. 1092, 89 L. ed. 1577, 157 A.L.R. 1366 (1945):

> "But [full faith and credit] does not make a sister-State judgment a judgment in another

state. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, the Records of the Federal Convention of 1787, 447, 448. 'To give it the force of a judgment in another state, it mustbe made a judgment there.' McElmovle v. Cohen, 13 Pet. 312, 325, 10 L. ed. 177. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass upon the merits -- had jurisdiction, that is, to render the judgment."

* * * * * * * * * * *

"Under our system of law, judicial power to grant a divorce -- jurisdiction, strictly speaking -- is founded on domicile. Bell v. Bell, 181 U. S. 175, 21 St. Ct. 551, 45 L. Ed. 804; Andrews v. Andrews, 138 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 336... Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicile of one spouse within a state gives power to that state... to dissolve a marriage wheresoever contracted."

****

> "In short, the [exparte] decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact."

It is the direct holding of this second Williams case that the question of domicile in an exparte proceeding is open to collateral attack by a sister state and that upon a finding that requisite domicile was lacking, the exparte decree is null and void.

Domicile, in turn, rests on a factual determination of whether or not the defendant acquired a Florida residence animus manendi -- with the intent that it be permanent. In re Bennett's Estate, 135 Misc. 486, 238 NYS 723 (1929).

The plaintiff's motive for effecting a true bona fide change in domicile cannot effect the issue of jurisdiction of the Court of domicile in respect to the marital res.

Nonetheless there is a clear distinction between a contrived attempt by a party litigant to make it "appear" as if he had established a "bona fide" domicile and a true, actual, bona fide, change of domicile, with true "Animus Manendi".

The defendant's history and conduct in connection with his marital litigation should shed some light upon the more illusive indications of his subjective intent submitted by the defendant. Systematic, unethical and fraudulent conduct on his behalf was exposed in his annulment action. (Matter of Javits, 35 A. D. 2d 442-1st Dep. 1971).

The defendant's history of litigation exhibits a particular awareness, concern and dexterity in seeking a Forum for litigation.

On November 9, 1961 he chose Connecticut as his Forum in his action for divorce and annulment (Pre-trial Order par 3(e)), only to discontinue the action after Susan appeared specially to contest the jurisdiction of that Court and then he commenced an action for annulment against Susan in the Supreme Court, New York County (Pre-Trial Order, Par. 3(b) (1). Again, he moved his efforts to Florida on March 24, 1967 while an appeal was pending in the New York action. (Joint Ex. I-1 and I-2).

The evidence adduced at trial established that Lewis was not timely domiciled in Florida on September 24, 1966 (six months prior to his instituting the Florida divorce action as requested by Florida Statutes, Section 61.02).

The following evidence adduced at trial established the fact that Lewis did not have a true Florida domicile on September 24, 1966, as required.

(a) In the Florida divorce hearing transcript itself, Walter Jahn, Lewis' witness, testified on May 12, 1967 "as late as 2 or 3 months ago (defendant) told me he was going to live in Florida from now on." (Emphasis supplied) (Ex. 14 on page 220a). This witness did not testify that Lewis had been domiciled in Florida for at least 6 months prior to the institution of the Florida divorce action.

(b) The Lotus Club (New York) by its manager, Christopher Lavis, produced the records (Ex. 4) which showed that Lewis, who had been a member since 1956, did not

change to a non-resident member until the second quarter of 1969 (81a).

(c) BENET POLIKOFF JR., a member of the bar in good standing of the firm of Marshall, Bratter, Allison, Swen and Trecher testified as Secretary of the Century Club (New York), that the first request of the defendant, Lewis, for a non-resident membership was not made until 1969 (99a-100a Ex.9) and that no statements from the club were sent to the defendant in Florida until 1972 (Ex. 10) altho' statements were exhibited for quarterly billings beginning with 1967 (101a).

(d) Schenley, with whom defendant was closely related rendered periodic reports to the Alcoholic & Tobacco Tax Division of the Treasury Department, stating the address of defendant in accordance with its records.

through and including the report of May 3, 1967 Schenley stated Lewis Rosenstiel's residence to be "New York or Connecticut". They reported Florida as his residence for the first time on December 20, 1967 (Ex. 11).

(e) Thomas A. Wise, a personal friend and Connecticut neighbor of defendant testified it was not until 1969 that defendant changed his routine and custom to live on the Connecticut property during the 4 summer months plus a few brief added periods (169a). Although he did testify as to defendant's profeesed desire to change his domicile in the future (171a), he testified that defendant never did state when he intended to do so (170a).

(f) Louis B. Nichols, a close personal friend of defendant and a colleague at Schenley recalled that until 1968 the

defendant evenly divided his time between Connecticut and Florida, spending as little time as possible in New York (174a).

He recalled further that it was not until 1968, that defendant began concentrating his time in Florida, summering still in Connecticut (176a). He stated that defendant before 1968 expressed a desire to retire from Schenley and live in Florida (181a)

(g) The defendant's personal comptroller, Seymour Roberts, testified it was not until 1968 that defendant resigned as Chairman of the Board and retired from Schenley, a New York based company (119a-120a). He testified that it was not until March of 1968 that defendant sold his interest in Schenley (141a-142a Ex IV-4).

He, too, testified that prior to 1968, defendant divided his time equally between Connecticut, New York and Florida (145-6a,147a, 148a). He testified that it was not until 1968, that defendant started to spend more time in Florida (151a).

He testified that most of defendant's brokers were in New York, although he had others in London, and Ohio. (126a-127a).

He testified that altho' defendant maintained bank accounts in California, Texas, New York, Connecticut and Florida, the largest accounts are in New York (158a).

He testified that until 1968 the defendant conducted business wherever he happened to be using offices around the country (121a) and carrying with him the records he required and a retinue of employees. (121a).

It would appear that defendant was not a bona fide domiciliary of Florida on or before September 24, 1966, the date required to give the Florida Court jurisdiction in his Florida divorce action.

The following evidence produced by Lewis in support of his contention that he had acquired the necessary domicile in Florida prior to the commencement of the Florida action does not, in fact, support his position.

(a) The Lewis' purchase of a new yacht in February, 1965 and registering its home port and radio license, as Miami, Florida (Joint Ex. II-11-12-13) is not persuasive as proof of his domicile at this time in Florida. This is particularly true, where as in the instant case, no showing was made by him as to where he had

registered his radio and the other yachts he owned at other times when he was concededly domiciled in Connecticut and had this Florida residence.

(b) Likewise the fact that defendant commenced negotiations in 1965 which concluded on March 20, 1968 for the sale of defendant's stock in Schenley to Glen Alden Corporation is not persuasive of defendant's change of domicile in 1965 (141a-144a; 190a; Joint Ex. IV-4).

(c) Nor is the commencement of negotiations for the sale of defendant's New York City town house in April, 1965 (137a; Joint Ex. II-23) evidence of a change of domicile from Connecticut to Florida in 1965, rather than on April 10, 1967 when the terms of sale were agreed upon or January 26, 1968 when the sale was consummated. (136a)

(d) Defendant's decision to add the amenity of a swimming pool to his Florida residence in 1966 is hardly persuasive of a change of domicile by him to Florida.

(e) Defendant's 1968 passport showing Florida as his residence has no probative value of his Florida residence in 1966 or 1967 (194a - Def.'s Ex. Q).

(f) The filing of defendant's homestead Exemption sworn to February 10, 1967 (Joint Ex. II-25 and II-26) on the eve of the institution of the Florida action is not persuasive of his actual domicile on and after September 24, 1966, the date required for the Florida Court to have proper jurisdiction of his Florida divorce action.

(g) Defendant's failure to vote in 1964-5-6 in Connecticut is no proof of

domicile in Florida during such period, where, as in the instant case, the defendant disclosed no voting record during that period in Florida. His request on March 1, 1967 (103a), on the eve of the institution of his Florida action, to have his name removed from the Connecticut voting records, lends no support to his claim that he had a bona fide Florida domicile since September, 1966 (107a). This is particularly true because he first registered to vote in Florida on June 1, 1967, 3 months after the institution of the Florida divorce case (Joint Ex. II-20).

(h) Finally, the defendant's presentation of a letter written by him to Florida Governor Burns, dated January 11, 1965 purporting to advise him of defendant's assumption of a Florida domicile (Joint Ex. II-1, 182a-184a) standing alone, is

insufficient to establish a change of domicile. (Joint Ex. II-1, 182a-184a). This letter was clearly a "contingency" action taken as a result of recommendations by Mr. Nichols and discussions with a Florida attorney whom Mr. Nichols recommended in 1964 (182a). Lewis did not properly supplement this letter with an actual and bona fide change of domicile before he instituted the Florida divorce action.

Most important is the fact that the person whose subjective state of mind (animus menandi) is being explored, elected not to testify at trial. The unrebutted testimony is that he remains alive, coherent and logical in his thoughts (152a-156a, 191a). The various inconclusive, contrived and vicarious pieces of evidence produced in

Lewis behalf do not outweigh the presumption that must flow from his election not to appear and testify at the trial herein.

Lewis did not have a bona fide domicile in Florida, as required, at the time the Florida divorce action under attack herein, was instituted. The judgment of divorce obtained by defendant against plaintiff in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida on May 12, 1967 is not entitled to recognition in the State of New York.

POINT II

THE PLAINTIFF IS ENTITLED TO A MOST FAVORABLE CONSTRUCTION IN RESPECT TO THE MEANING OF THE LANGUAGE USED IN THE PREMARITAL AGREEMENT. THE PREMARITAL AGREEMENT SURVIVED THE FLORIDA DIVORCE.

The pre-marital agreement between the parties provides in part that the plaintiff's rights therein would lapse

> should the parties be "divorced or separated by a decree of a Court of competent jurisdiction, or separated by written agreement --" prior to the death of defendant.(Par. 1(1) of Joint Ex. IV-3).

It is a well settled rule that the intention of the parties is determined not only by a fair construction of the terms and provisions of the contract under consideration

but also by the rights to which it has reference as well as circumstances of the particular transaction (10 N. Y. Jur. Contracts Section 225).

In Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co. 69 Cal 2d 33, 69 Cal. Rept. 561, 442 P 2d 641 (1968) the Court said:

> " A rule that would limit the determination of the meaning of a written instrument to its four corners merely because it seems to the Court to be clear and unambiguous would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."

The language of the agreement "divorced--by a decree of a Court of competent jurisdiction" is subject to the following constructions:

> A. Divorced by a decree of a Court of competent jurisdiction

to pass on the marital status and the property rights of the parties (having "in rem" and "in personam" jurisdiction)

or

B. Divorce by a decree of a court of competent jurisdiction to pass on the marital status alone, of the parties (having "in rem" jurisdiction.

The well settled rule is stated in Restatement of Contracts 2d, Par. 236 (d):

> "Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed."

In Moran v. Standard Oil Co. of New York, 211 N. Y. 194, 105 N. E. 211 (1914) the Court, by Judge Cardozo said:

> "The contract was drawn by defendant's lawyers and was tendered to the plaintiff with the assurances, as he says, that his future for the

> the next five years would be secure. Since the language is the defendants' we must construe it if its meaning is doubtful most favorably to the plaintiff. Gillet v. Bank of America, 160 N. Y. 549, 555, 55 N. E. 292; Marshall v. Coml. Tr. Mut. Acc. Assn. 170 N. Y. 434, 63 N. E. 446".

In the instant case plaintiff testified that she was led to believe the purpose of the amendment was to afford her financial protection in the face of certain purported difficulties the defendant was having with his children by his first marriage (77a, 78a, 79a). This was uncontroverted.

A unique feature of ante-nuptial agreements is that they are not entered into at arm's length. They are created amid trust and reliance inherent in the

relationship of two people contemplating matrimony. For this reason, rules of construction and enforcement are applied to them that require the very highest standards of open disclosure and fair dealing.

Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22 (1877)

Pre-nuptial agreements are accordingly construed most favorably to the wife. As the Court said in Stuppell v. Hayes, 189 Misc. 656, 69 N. Y. S. 2d 882 (1947):

> "The plaintiff parted with valuable considerations and waived substantial rights in return for the benefits to be conferred upon her, and the provision in respect thereto must be construed most favorably to her. " Spencer v. Spencer, 38 App. Div. 483, 488, 56 N. Y. S. 460, 461."

The Trial Court placed undue reliance upon the effect of an ex parte divorce on the

right of election absent an agreement in respect thereto.

A clear distinction must be made between the effect of a decree of divorce by a Court of competent jurisdiction to grant such divorce (albeit "in rem") upon the statutory right of election absent a contractual agreement and its effect where there is an agreement as in the instant case.

In re Adams Will, 142 N. Y.S. 2d 32

It is clear that a subsequent Court may adjudicate property rights (under an agreement) even when those rights flow from a marriage unimpeachably dissolved by a prior ex parte decree of a sister state.

Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213; 92 L. Ed. 1561 (1948

Armstrong v. Armstrong, 350 U.S. 568 76 Sup. Ct. 629, 100 L. Ed. 705 (1956)

It is not the Florida decree that is being challenged for the purposes of this argument. It is the interpretation of the agreement sought to be supported by the defendant that is challenged.

It is clear that the purpose of an ex parte decree may be to vindicate state interest in a vinculum of a marriage. Only where there is in personam jurisdiction is a court concerned with all the incidents of the parties and their marriage as an integrated problem. It is for that reason that the Florida Court in ex parte divorce proceedings lacked power to act beyond the marital res.

Estin v. Estin, 334 U. S. 541
68 S. Ct. 1213, 92 L. Ed. 1561(1948)

It is for the instant Court to construe the ante-nuptial agreement.

POINT III

A CONSTRUCTIVE TRUST SHOULD BE IMPRESSED TO PROVIDE IN DEFENDANT'S ESTATE ASSETS SUFFICIENT TO SATISFY PLAINTIFF'S RIGHT UNDER THE ANTE-NUPTIAL AGREEMENT.

According to the testimony, none of the proceeds of the sale of defendant's Schenley stock has been set aside to assure plaintiff's right to these proceeds. (150a).

Title to the Connecticut real estate has been wholly in trust since 1970. Title to New York real estate contiguous to the Connecticut property is similarly in trust (117a). And the Florida property is only half in Defendant's name (118a-119a).

It has been stipulated that defendant's current will makes no provision for plaintiff. (192a).

POINT IV

PLAINTIFF IS ENTITLED TO AN AWARD OF COUNSEL FEES FROM DEFENDANT IN THE PROPER EXERCISE OF SOUND DISCRETION.

Section 237 of the New York Domestic Relations Law, provides in part that the Court may direct the husband to pay counsel fees in any action or proceeding "4. to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment" or "5. by a wife to enjoin the prosecution in any other jurisdiction of an action for divorce."

The amended complaint-first claim herein seeks in part to declare the ex parte

Florida decree of divorce a nullity. In addition, a proceeding was brought herein to obtain the preliminary relief of a restraining order enjoining the prosecution of a proceeding for divorce in Florida. Accordingly, in these respects the instant case falls directly within the provisions of Section 237 (4) and (5) of the Domestic Relations Law.

The Trial Court recognized the applicability of Section 237 (4) and (5) in the instant case in part but denied counsel fees on the ground that the plaintiff's claim had "minimal merit". At the same time the Trial Court was constrained to note in respect to the attack on domicile that

> "where, as here, a person maintains several households in different

> states, the determination is rendered more difficult. Obviously, those wealthy enough to have multiple residences have an equal right along with those less fortunate to change their domiciles. The effect of their wealth simply renders the factual determination that much more difficult. In such circumstances the determination of domicile involves a comparison of the weight of the evidence of actual facts as to residence and the defendant's real attitude and intention as disclosed by his entire course of conduct." (Emphasis supplied)

The fact that the trial court recognized that the resolution was "more difficult" and involved a factual determination based on the defendant's entire course of conduct hardly supports a conclusion that plaintiff's claims are "minimal". It should be recognized that the trial court felt constrained to use more than a dozen pages to decide these "minimal" claims.

No matter what the trial court ultimately

purports to find "on balance" after a full trial and disclosure of all evidence, it can hardly be the conclusion that plaintiff's claims as submitted for determination were minimal.

The other ground proffered by the trial court in support in denial of counsel fees, the fact that plaintiff has a substantial income of $96,000 a year from support payments the defendant makes to her is irrelevant. It assumes that$96,000 is available to her. It assumes again that $96,000 is, in fact, received by her. It assumes that the amount received by her is more than adequate to meet her ordinary needs and requirements. It assumes that she is able to support the weight of the instant litigation without contribution by defendant. These assumptions are unwarranted.

None of these assumptions are supported by any factual evidence.

On the contrary, it must be assumed that alimony and support were fixed by a factual finding of plaintiff's needs and requirements for support and maintenance and did not contemplate either the burden of counsel fees in the action in which alimony was fixed - counsel fees being awarded separately - or counsel fees incurred in the prosecution of subsequent actions contemplated by Section 237 (4) or (5) of the Domestic Relations Law.

The issue of the amount of counsel fees was by stipulation held in abeyance pending a determination of the issue at trial. Accordingly the judgment should be reversed in

this respect and the reverter remitted to the trial court for hearing and determination of the amount allowable for counsel fees herein.

CONCLUSION

The Judgment of the Trial Court should be reversed. Judgment should be granted

(1) Ordering the ex parte Florida Divorce obtained by the defendant against plaintiff to be invalid because of the lack of the required bona fide domicile of defendant to support that Court's jurisdiction.

(2) Declaring the pre-marital agreement between the parties in full force and effect.

(3) Imposing a constructive trust to

provide in defendant's Estate assets sufficient to satisfy plaintiff's rights under the Ante-Nuptial Agreement.

(4) Remanding the matter to the trial court for a hearing and allowance of counsel fees pursuant to Section 237 (4) (5) of the New York Domestic Relations Law.

Respectfully submitted,

JESSE COHEN
Attorney for
Plaintiff-Appellant

NEW YORK DOMESTIC RELATIONS LAW

§ 237. Counsel fees and expenses

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, the court may direct the husband, or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, to pay such sum or sums of money to enable the wife to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment. Upon application of the husband or the wife or the person or persons maintaining an action for annulment after the death of the husband, upon such notice to the other party and given in such manner as the court shall direct, the court may, in or before final judgment, annul or modify any such direction. Subject to the provisions of section two hundred forty-four of

of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

FLORIDA STATUTES

61.021 Residence required

To obtain a divorce plaintiff must reside six months in the state before filing the complaint, but this does not affect any suit for divorce filed before October 1, 1957.

SERVICE OF 2 COPIES OF THE WITHIN

Brief

IS HEREBY ADMITTED.

DATED: 7/25/74

Nathan Z. Dershowitz

Attorney for Def.